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84-1433

No.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

Kenneth Alexander Brown

Petitioner,

vs.

Norma Paulus, et al

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Kenneth Alexander Brown, Pro se
1837 Portland Dr., NE
Cervais, Oregon 97026
(503) 792-4550

QUESTIONS PRESENTED FOR REVIEW

1. Whether state officials, enforcing a patently unconstitutional state statute involving censorship and suppression of free speech in a state sponsored pre-election publication have properly met the test of qualified immunity under the Eleventh Amendment?

2. Whether state officials, under sworn oath to uphold the Constitution of the United States, have indeed not violated that oath and a citizen's civil and constitutional rights by enforcing such a law as Oregon Revised Statute 251.055?

3. Whether recourse to such case law as Beauharnais v. Illinois does not employ unconstitutional statute?

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42 U.S.C #1983, and the Civil Rights Act of 1886.

No.

In the Supreme Court

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OCTOBER TERM, 1985

Kenneth Alexander Brown

Petitioner,

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Norma Paulus, et al,

Respondents

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

To The Honorable Chief Justice of the United States, and to The Associate Justices of the United States Supreme Court:

Petitioner Kenneth Alexander Brown files this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of the District Judge in awarding summary judgment to the Respondents (Defendants).

In support of the Petition, it is respectfully shown as follows:

OPINIONS BELOW

A copy of the Court of Appeals opinion is attached as Appendix A...Said Memorandum decision affirming District Court Order dated October 15, 1984. The Court denied petitioner's petition for rehearing -- Appendix B, dated Nov. 23, 1984.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1). No other petitioner is involved in this petition.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law..... sbridging the freedom of speech, or of the press;.....

STATEMENT OF THE CASE

This case was originally dismissed without a hearing in an Order filed Aug. 2, 1980 in the U. S. District Court, District of Oregon. Appendix C.

In dismissal the District Judge accepted Edelman v. Jordan as guidance and Defendants' claim that action was against state (although unnamed) and therefore Defendants were shielded by immunity of Eleventh Amendment.

On appeal, an Order filed June 2, 1982 by the Ninth Circuit Court of Appeals reversed and remanded. Countering the District Court acceptance of Eleventh Amendment immunity for state officials, the Appeals panel raised the question as presented in Scheuer v. Rhodes, 416 U.S. 232,238 (1974), that such Eleventh Amendment immunity is not absolute.. As there: "....defendant acted either outside the scope of office or arbitrarily abused the powers of office."

Likewise in Ronwin v. Shapiro, 657 F. 2d 1071 (9th Cir. 1981) the court ruled against officials seeking immunity sanctuary under provisions of the Eleventh Amendment.

On remand to District Court Plaintiff

was not granted the jury trial requested. The Court instead entertained a Motion for Summary Judgment by Defendants. In an Order dated April 25, 1983 Summary Judgment was granted to Defendants. In finding for the Defendants (Respondents) the district Judge accepted Beauharnais v. Illinois 343 U.S. 250 (1952) as guidance. In Beauharnais, as in the Oregon Revised Statute 251.055 direct legislative enactment declares certain subjects of speech as unprotected speech. The subjective terms of scandalous and defamatory are established as benchmarks beyond which these state statutes aver First Amendment guarantees of free speech do not apply. This Summary Judgment Order Appendix E att.

The District Court ignored Scheuer (basis of Ninth Circuit remand) and applied instead "objective test of good faith". From Harlow v. Fitzgerald 102 S. Ct. at 2738 that standard of good faith is met if: "..... his conduct does not violate clearly established

statutory or constitutional rights of which a reasonable person would have known."

In the Ninth Circuit Order of Oct. 15, 1984 (Appendix A) affirming the District Court Summary Judgment, it must be noted that the panel did not consider the strictures of the Scheuer decision that had guided the Ninth Circuit in granting the original reversal and remand to Petitioner. It is to be noted that in this Ninth Circuit Order being appealed the Appeals Court in its decision accepted Harlow with its critical sentence: "....of which a reasonable person would have known." In Harlow the stipulation is "reasonable" person, not necessarily a legally trained person, but an ordinary citizen of reasonable intelligence.

The question to be resolved in this interpretation of Harlow is "Would a reasonably intelligent person consider censorship and suppresion of a political statement in a

state funded publication by state officials as being in "violation of clearly established statutory or constitutional rights."

Resolution of this Court is required to clear the uncertainty created by conflicting decisions between panels of the Ninth Circuit Court of Appeals.....To consider the facets of the case to determine if the question of "good faith" as required in Harlow had actually been met by the Respondents; and to bring into review the Beauharnais decision which brazenly repudiates the First Amendment. Likewise Oregon Revised Statute 251.055 which likewise seeks abridgment of the First Amendment.

CONCLUSION

For the foregoing reasons, petitioner Kenneth Alexander Brown respectfully requests that a writ of certiorari issue to review the judgment of the U. S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Kenneth Alexander Brown Rose

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 83-3833

DC No. CV 80-494 BE

Kenneth Alexander Brown
Petitioner-Appellant,

vs.

Norma Paulus , et al
Respondent-Appellee
(Filed Oct. 15,1984)

MEMORANDUM

Appeal from the United States Dist. Court for the District of Oregon

Before: KENNEDY and FERGUSON, Circuit Judges, and WILLIAMS,**District Judge

Oregon law permits a political candidate to submit a campaign statement to the Secretary of State to be published in the Oregon Voters' Pamphlet which is circulated prior to the election. As a candidate for the U. S. Senate, Kenneth Alexander Brown ,appellant, submitted a statement to Secretary of State Paulus which contained strong language warning against a "Jewish Zionist conspiracy" and its control over all our

our governing bodies "with a vice-like grip." Brown attributed "treachery and intrigue, assassinations and mass killings" to Jewish Zionism.

Paulus looked upon the statement as obscene, defamatory and likely to incite racial or religious hostility, and sought advice concerning its acceptance from the then Attorney General, James A. Brown. Acting upon this advice, Paulus rejected the statement for publication on the authority of Or. Rev. Stat. § 251.055 (1) which provides, in pertinent part:

> The Secretary of State shall reject any statement, argument, or other matter offered for filing and printing in a voters' pamphlet which
>
> (a) Contains any obscene, profane, scandalous or defamatory language;
>
> (b) Incites, promotes or advocates hatred, abuse, violence, or hostility toward, or which tends to cast ridicule or shame upon any person or group by means of race, color, religion, or manner of worship.

Appellant sued both officials for damages, alleging violations of his civil rights under 42 U.S.C. # 1983 and the Civil Rights Act of 1866. That action was dismissed as barred by the Eleventh Amendment, but this court reversed and remanded for a determination as to whether the plaintiff was seeking to hold defendants individually liable for conduct beyond their official duties, which is not immunized by the Eleventh Amendment. Brown v. Paulus, No. 80-3496 (9th Cir. May 19,'82)

On remand, defendants moved for summary judgment, and the trial judge granted the motion, finding that the officials were protected from liability for damages by their qualified good faith immunity, citing Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982) and Scheuer v. Rhodes, 516 U.S. 232 (1974). The lower court also rejected appellant's claim that he was deprived of First Amendment rights, citing Beauharnais v. Illinois, 343 U.S. 250 1952, in holding that Brown's statement was

not protected speech.

The defendants were acting under the mandate of Or. Rev. Stat. # 251.055 when they caused the rejection of Brown's statement. Our reading of the statute makes it constitutionally suspect under Freedman v, Maryland, 380 U.S. 51, 58 (1965), but the constitutionality of the statute for that reason has not been asserted by plaintiffs and we decline to do so sua sponte.

We affirm the judgment of the lower court upon the basis that the State of Oregon is the real party in interest and is barred from suit by the Eleventh Amendment. The trial judge correctly concluded that the two officials were acting in their official capacities, not individually, in rejecting the statement. Paulus was required, as the election officer, to reject a defamatory statement, and did so after receiving advice from the Attorney General who was required by Or. Rev. Stat. # 180.060(2) to render

APPENDIX B

United States Court of Appeals
For the Ninth Circuit

No. 83-3833

DC No. CV 80-494 BE

Kenneth Alexander Brown

Petitioner-Appellant,

vs.

Norma Paulus, et al

Respondent-Appellee

(Filed Nov 23, 1984)

ORDER

Before: KENNEDY AND FERGUSON, Circuit Judges and WILLIAMS, *District Judge.

The petition for rehearing is denied.

---

*Hon. David W. Williams, Senior U.S. District Judge for the Central District of California, sitting by designation.

his opinion upon a question of law when requested by a state officer such as Paulus.

Defendants are entitled to a qualified immunity in the performance of their official duties. Buts v. Economou, 438 U. S 478 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976). Paulus and Attorney General Brown were attending to matters committed by law to their control and supervision and acted within their discretion. Officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct (did) not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 102 S. Ct. 2727, 73 L. Ed. 2d 396, 410 (1982).

AFFIRMED

Judge Kennedy concurs in the result

** Hon. David V. Williams, Senior United States District Judge, Central District of California, sitting by designation

APPENDIX C

United States District Court

District of Oregon

Civil No. 80-494

Kenneth Alexander Brown

Plaintiff,

v.

Norma Paulus, et al

Defendants.

(Filed Aug. 28, 1980)

ORDER

Before Helen J. Frye, District Judge

James F. Brown moved to dismiss plaintiff's amended complaint on the grounds that he was not served and was not properly added as a named defendant. Brown has since been served and the plaintiff has filed a motion for leave to add Brown as a defendant.[1]

Brown and defendant Norma Paulus have also moved to dismiss this action on the grounds that it is barred by the Eleventh Amendment to the United States Constitution.

The first issue the court must determine is whether or not the amended complaint is directed against the State of Oregon or

against Norma Paulus as an individual. From the amended complaint it appears that only unnamed clerks or deputies of Paulus had contact with plaintiff or his filing of a campaign statement. There is nothing in the pleading to indicate Paulus acted individually. It is therefore determined that the essential nature and effect of this amended complaint, which seeks monetary damages totaling $3 million, is directed against the State of Oregon and that the State of Oregon is the real party in interest. See Edelman v. Jordan, 415 U.S. 651, 664 (1974).

The Eleventh Amendment bars an action against an unconsenting state brought by one of its citizens in the federal courts. Edelman v Jordan, id. This is true even though the State is not a named party, so long as it is in fact the real party in interest. Edelman, id.

IT IS ORDERED that defendant's motion to dismiss is granted. This action is dismissed.

DATED this 28 day of August, 1980.

(Signed)

Helen J. Frye
United States District Judge

APPENDIX D

United States Court of Appeals
For the Ninth Circuit

No. 80-3496

Kenneth Alexander Brown
Petitioner-Appellant

vs.

Norma Paulus, et al
Respondent-Appellee

Filed May 10, 1982

Appeal from the United States District Court for the District of Oregon

Helen J. Frye, District Judge, Presiding

Submitted February 3, 1982*

Before: ANDERSON, TANG, and BOOCHEVER, Circuit Judges.

Brown's amended complaint alleges that defendants Paulus, the Oregon Secretary of State and Oregon Attorney General James Brown willfully discriminated against Brown by excluding his campaign statement for the 1980 primary election from the Oregon Voters' Pamphlet. It further alleges that defen-

* The panel unanimously agrees that this case should be submitted without oral argument. Ninth Circuit Rule 3(a)(2)(3).

dants violated their oaths of office through "contemplative, purposeful and willful conspiratorial collusion."

The district court dismissed the action as barred by the Eleventh Amendment, finding that the action was directed against the State because nothing in the complaint indicated Paulus acted individually. After granting Brown's petition for reconsideration, the district court adhered to its former ruling. Brown appeals.

The Supreme Court has consistently held that the Eleventh Amendment bars damage suits in federal courts against an unconsenting state by her own citizens. See Edelman v. Jordan, 415 U.S. 651, 662-63(1974) and cases cited therein. In Quern v. Jordan, 440 U.S. 332, 339-41 (1979), the Supreme Court reaffirmed that 42 U.S.C. #1983 does not override Eleventh Amendment immunity. The Eleventh Amendment bars suits against

a state when it is the named party and when it is the party in fact. Edelman, 415 U.S. at 663; Ronwin v Shapiro, 657 F. 2d 1071, 1073 (9th Cir. 1981)

The Eleventh Amendment, however, does not always bar damage suits against public officials. Scheuer v. Rhodes, 416 U.S. 232, 238 (1974). In Scheuer, the district Court dismissed, before answer, #1983 damage actions the Governor, Adjutant Governor, officers and members of the National Guard, and other state officials, on the ground that the actions were against the State and thus barred by the Eleventh Amendment. The complaints alleged that defendants intentionally and recklessly caused a deployment of the Ohio National Guard at Kent State University and ordered the Guard to act illegally, resulting in the deaths of three students. The Supreme Court held that dismissal was inappropriate at this stage of the litigation and reversed and remanded.

It stated that the complaints, fairly read, allege that each defendant acted either outside the scope of office or arbitrarily abused the powers of office. Id. at 235. The Court concluded that petitioners alleged facts showing that they sought to impose individual and personal liability on the named defendants and thus, the Eleventh Amendment did not bar their claims. Id. at 238.

In Ronwin v. Shapiro, 657 F. 2d 1071 (9th Cir. 1981) this court considered whether a defamation suit against the Board of Regents and members of the Arizona Law Review should be regarded as one against the State. We stated that a crucial factor is "(w)hether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury" Id. at 1073. It distinguished the status of the law review members from

that of the Board of Regents because recovery would be from individuals, not the State, and concluded that the individual defendants were not protected by Eleventh Amendment immunity. Id. at 1074-75.

From the fact of Brown's amended complaint, it is not clear whether he seeks to impose liability against defendants personally or in their representative capacity.

Construing Brown's pro se amended complaint liberally in the light most favorable to him, the complaint alleges that defendants acted either outside the scope of their office or abused their powers of office.[1] See Scheuer, 416 U.S. at 238; West v. Keve, 571 F 2d 158 (3d Cir. 1978). So construed, his complaint seeks to impose personal liability on defendants and is not barred by the Eleventh Amendment.

The district court's dismissal of Brown's action rendered moot Brown's motion for

leave to add Attorney General Brown as a defendant. Because the district court erred in dismissing the action at this stage of the proceedings, we find it necessary to reverse. On remand, Brown should be granted a hearing on his motion to add the Attorney General as a defendant.

REVERSED and REMANDED.

---

1. He alleges that defendants "willfully and knowingly" discriminated against him, that they "violated their oaths of office," and that "Defendant's claim of power through state statute is a spurious reach for authority as any competent lawyer should well know."

APPENDIX E

In the United States District Court
For the District of Oregon

Civil No. 80-494 BE

Kenneth Alexander Brown
Petitioner (Plaintiff)

vs.

Norma Paulus, et al
Respondent (Defendants)

OPINION AND ORDER
Filed Oct. 15, 1984

Judge: BELLONI

This matter comes before the Court on defendants' Motion for Summary Judgment. Having considered the parties' argument and briefs, I have decided that defendants' motion should be granted.

Plaintiff Kenneth Brown sued defendants Norma Paulus, Secretary of State of the State of Oregon, and James Brown, former interim Attorney General of the State of Oregon, for damages for an alleged violation of his constitutional rights. Plaintiff was a candidate in the United States

Senate primary election of 1980. He alleges that defendants knowingly and willfully conspired to deprive him of his First Amendment rights by refusing to publish his duly submitted campaign statement in the Oregon Voters' Pamphlet.

Plaintiff's campaign statement discussed what he described as "the mortal danger of the hour": that an alleged "Jewish Zionist" conspiracy will engineer the takeover of this country by the Soviet Union. He attributed "treachery and intrigue, assassinations and fomented wars, induced famines and mass killings" to "Jewish Zionism". He also asserted that "Jewish Zionism" controls all of our governing bodies "with a vice-like grip".

Defendant Norma Paulus, acting on the advice of then Attorney General Brown, rejected plaintiff's statement for publication in the Oregon Voters' Pamphlet on the

authority of ORS 251.055 (1), which statute provides in part as follows:

> 1. The Secretary of State shall reject any statement, argument, or other matter offered for filing and printing in the voters' pamphlet which
>
> (a) Contains any obscene, profane, scandalous, or defamatory language;
>
> (b) Incites, promotes or advocates hatred, abuse, violence, or hostility toward, or which tends to case ridicule or shame upon any person or group by means of race, color, religion, or manner of worship.

It is defendants' position that plaintiffs' campaign statement was scandalous and defamatory, and tended to promote racial and religious hatred, and that its rejection was mandated by the quoted statute. Plaintiff contends that defendants' rejection of his statement deprived him of his First Amendment rights.

Defendants argue that they are immune from liability for civil damages on three grounds: that they are immune from suit under the Eleventh Amendment; that they are absolutely immune from suit in the

exercise of their discretionary authority; and that they enjoy a qualified, good faith immunity from suit. Addressing the merits of plaintiff's complaint, they argue that plaintiff was not deprived of his First Amendment rights, citing Beauharnais v. Illinois 343 U.S. 250 (1952). In that case the court affirmed the imposition of criminal sanctions on a publisher of inflammatory and derogatory material concerning blacks as a group. The statute under which the sanctions were imposed prohibited publications attacking citizens of any race, color, creed, or religion with attributions of depravity, criminality, unchastity, or lack of virtue, or with obloquy. The court reasoned that the publications prohibited by the statute were not protected speech, because they were defamatory. The court also held that the particular publication in question, which attributed vicious and violent crimes to blacks as a group, was

exactly the sort of group defamation that the statute legitimately prohibited.

Plaintiff's campaign statement was at least as defamatory of Zionist Jews as the publication in Beauharnais v. Illinois was of blacks. In accordance with the reasoning in Beauharnais, such utterances are not protected speech, any more than speech which is defamatory of individuals is protected speech. Thus, defendants' refusal to publish plaintiff's campaign statement in the Oregon Voters' Pamphlet did not deprive plaintiff of his First Amendment rights.

But even if plaintiff's campaign statement was protected speech, defendants are shielded from liability for damages herein by their qualified good faith immunity from suit. This immunity protects certain officials in the executive branch of government in the performance of their discretionary duties. Scheuer v. Rhodes 416 U.S. 232 (1974).

In Harlow v. Fitzgerald 102 S.Ct. 2727 (1982) the Court established an objective test of good faith, so that in a proper case, the applicability of the immunity could be determined upon a motion for summary judgment. An official meets the objective standard of good faith if his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 102 S. Ct. at 2738. In this case, defendants belief that plaintiff's campaign statement could be rejected without violating his constitutional rights was reasonable in light of the Beauharnais case and in light of the language of ORS 251.055(1). Thus, they are shielded from liability for damages by their qualified good faith immunity.

There is no issue as to any material fact herein, and defendants are entitled to judgment as a matter of law. Defendants'

Motion for Summary Judgment is hereby granted.

Dated this (25) day of April, 1983.

(signed) BELLONI

United States District Judge

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1985

No._____

Kenneth Alexander Brown,
Petitioner

v.

Norma Paulus, et al
Respondents

PROOF OF SERVICE

This is to certify that I, Kenneth Alexander Brown, have this day hand delivered to the office of the Oregon State Attorney General, DAVE FROHNMAYER, Justice Bldg., Salem Oregon, 97310, Atty for Respondents, 3 true and exact copies of this petition for a writ of certiorari to the U. S. Court of Appeals for the Ninth Circuit.

Dated March 5, 1985.

Kenneth Alexander Brown

Kenneth Alexander Brown, Pro se

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